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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JACK KHOUDARI et al., Plaintiffs and Appellants, v. SCOTT DAVALOS et al., Defendants and Respondents.	B298628 (Los Angeles County Super. Ct. No. BC648883)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Lieber & Galperin, Stanley P. Lieber, Patrice J. Hensley, Yury Galperin, Jason A. Lieber, for Plaintiffs and Appellants.

No appearance for Defendants and Respondents.

Plaintiffs and appellants Jack Khoudari, Valerie Khoudari, and Nadzeya Huselnikava voluntarily dismissed their complaint as to defendants Gaurav Srivastava and Veecon Biotech, LLC, following settlement.[1] The trial court denied a motion to vacate the dismissal and enforce the settlement agreement under Code of Civil Procedure section 664.6, as well as a motion for reconsideration.[2] On appeal from the post-judgment order denying the motion for reconsideration, appellants contend: (1) they properly requested the trial court retain jurisdiction to enforce the settlement under section 664.6; and (2) the trial court should have granted their motion for reconsideration under section 473, subdivision (b), because they submitted an attorney affidavit of fault. We conclude appellants failed to ask the trial court to retain jurisdiction to enforce the settlement orally before the court or in a writing signed by the parties, not by their attorneys, as required under section 664.6. They did not satisfy the requirements for reconsideration under section 1008, because their attorney's affidavit did not contain new facts or an explanation for not presenting information earlier about his mistake. In addition, they were not entitled to mandatory relief under section 473,

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[1] No respondent's brief has been filed on appeal.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

subdivision (b), from a voluntary dismissal, and the trial court did not abuse its discretion by denying relief from a mistake of law. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On February 1, 2017, plaintiffs filed an action for fraud and breach of contract against Srivastava, Veecon, and Scott Davalos. On May 16, 2017, default was entered against Veecon. Davalos filed a second amended answer on June 13, 2017. At the final status conference on August 24, 2018, plaintiffs' counsel represented that the matter had been settled and dismissals would be filed. He stated that he would ask the court to retain jurisdiction pursuant to section 664.6. The trial court advised plaintiffs' counsel that a stipulation and order thereto was required.

On August 29, 2018, plaintiffs filed a request for dismissal without prejudice as to Davalos, which the court clerk entered that day. Plaintiffs filed a separate request for dismissal with prejudice that had an attachment. The attachment requested the court dismiss the action with prejudice as to Srivastava and Veecon, and requested "that the court retain jurisdiction to enforce settlement pursuant to CCP 664.1."[3] The request was signed by plaintiffs'

[3] The reference to CCP 664.1 was a typographical error, as there is no such section. As discussed below, that reference was intended to Code of Civil Procedure section 664.6.

counsel. The court clerk entered the dismissal with prejudice as set forth in the attachment that day.

On September 4, 2018, there were no appearances for either side at a final status conference. No notice had been provided to the court concerning the failure to appear, and no notice of settlement had been filed. The court appears not to have been provided the requests for dismissal, as the minute order notes a request for dismissal has not been filed. Based on counsel's prior representations, the court deemed the matter settled and vacated the final status conference and trial. The court set an order to show cause regarding dismissal for October 31, 2018.

On October 26, 2018, plaintiffs' attorney filed a declaration explaining that a request for dismissal without prejudice had been filed as to Davalos and a request for dismissal with prejudice had been filed as to Srivastava and Veecon, including a request that the court retain jurisdiction to enforce settlement pursuant to section 664.6. He noted that the plaintiffs intended to file an application for judgment pursuant to section 664.6 as to Srivastava and Veecon, because they failed to comply with the terms of settlement.

On October 30, 2018, plaintiffs filed an application for an order entering judgment against Srivastava and Veecon pursuant to the terms of the settlement agreement in accordance with section 664.6. They attached the signed settlement agreement in which Srivastava and Veecon agreed to pay $30,000 by September 10, 2018, in exchange

for dismissal of the action with prejudice, including a request that the trial court retain jurisdiction pursuant to section 664.6. Plaintiffs noticed the motion for hearing on December 3, 2018.

A hearing was held on October 31, 2018. The trial court admonished plaintiffs' counsel that there was no stipulation satisfying section 664.6, and the court did not have jurisdiction to enforce the settlement. Since the requests for dismissal had been filed on August 28, 2018, the order to show cause was discharged.

Neither party appeared at the hearing on plaintiffs' application for an order entering judgment that had been noticed for December 3, 2018, and the court took plaintiffs' motion off calendar.

In February 2019, plaintiffs filed a motion to vacate the dismissal and enter judgment against Srivastava and Veecon pursuant to section 664.6, on the ground that the parties had entered into a settlement agreement stating their express intent for the court to retain jurisdiction and had requested that the court retain jurisdiction. Although the title of the motion and the proposed order accompanying the motion requested that the court vacate the dismissal, plaintiffs did not include any argument in the body of the motion regarding a basis for vacatur. Further, the motion did not mention section 473, subdivision (b), or state that any mistake had been made. Plaintiffs submitted their attorney's declaration and the settlement agreement in support of the motion under section 664.6.

A hearing was held on March 20, 2019, at which plaintiffs appeared, but defendants did not. The trial court noted that plaintiffs relied solely on section 664.6, but they had failed to present a request to the court to retain jurisdiction before dismissing the case. The trial court went on to note that plaintiffs had neither argued, nor submitted evidence to show of mistake, inadvertence, neglect, or surprise that would allow the motion to be granted under section 473. Based on this, the court denied the motion without prejudice.

Plaintiffs then filed a motion for reconsideration on the ground that they learned on March 20, 2019, that due to mistake, the court did not retain jurisdiction pursuant to section 664.6. By mistake, they had failed to submit a stipulation to the court with a proposed order requesting that the court retain jurisdiction, then they failed to note the mistake in the first motion to vacate. Due to a typographical error, the request for dismissal of Srivastava and Veecon referred to section 664.1 when it should have referred to section 664.6. Plaintiffs' attorney was not aware that the court did not retain jurisdiction and mistakenly filed the motion to vacate without explaining the mistake. Plaintiffs asked the court to set aside the dismissal pursuant to section 473, subdivision (b), and enter judgment in their favor against Srivastava and Veecon in the amount of $30,000.

Plaintiffs' attorney submitted his declaration stating that it was his mistake that there was not a stipulation and

order submitted to the court requesting that the court retain jurisdiction pursuant to section 664.6.

After a hearing on the motion for reconsideration on May 9, 2019, the court denied the motion for reconsideration. The plaintiffs filed a timely notice of appeal from the post-judgment order entered on May 9, 2019. Although no reporter's transcripts have been made part of the record on appeal, plaintiffs provided a settled statement for the hearings on March 20, 2019, and May 9, 2019, which statement was approved by the trial court.

DISCUSSION

Statutory Requirement to Reserve Jurisdiction

Appellants contend that they properly filed a written request for the trial court to retain jurisdiction under section 664.6 when they requested dismissal of the complaint against Srivastava and Veecon, and the trial court erred by failing to retain jurisdiction. This is incorrect.

Under section 664.6, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

"'Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit.' (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809.)" (*Sayta v. Chu* (2017) 17 Cal.App.5th 960, 964 (*Sayta*).) "Like section 664.6 motions themselves, requests for retention of jurisdiction must be made prior to a dismissal of the suit. Moreover, like the settlement agreement itself, the request must be made orally before the court or in a signed writing, and it must be made by the parties, not by their attorneys, spouses or other such agents. If, after a suit has been dismissed, a party brings a section 664.6 motion for a judgment on a settlement agreement but cannot present to the court a request for retention of jurisdiction that meets all of these requirements, then enforcement of the agreement must be left to a separate lawsuit." (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 433.) Even where the settlement agreement provides that the trial court will retain jurisdiction pursuant to section 664.6, if the parties fail to request that the trial court retain such jurisdiction in compliance with the requirements of section 664.6 and the plaintiff files a voluntary dismissal of the entire cause, the court lacks subject matter jurisdiction to enter a judgment pursuant to section 664.6. (*Sayta*, *supra*, 17 Cal.App.5th at p. 966.)

It is clear from the record in this case that prior to dismissal of the action, appellants' attorney alone requested the trial court retain jurisdiction to enforce the settlement.

The request for dismissal was not signed by any of the parties, and the settlement agreement was not submitted to the trial court in connection with the request to retain jurisdiction. The request that the court retain jurisdiction did not meet the requirements of section 664.6, and therefore, the court did not retain jurisdiction to enforce the settlement.

To the extent that appellants contend the trial court should not have entered their dismissal because the request to retain jurisdiction would not be effective, their contention is barred by the doctrine of invited error. "'Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error.' (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.) 'The "doctrine of invited error" is an "application of the estoppel principle": "Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal" on appeal. [Citation.] . . . At bottom, the doctrine rests on the purpose of the principle, which is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court.' (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.)" (*Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1203–1204.) In this case, the trial court entered the dismissal that appellants requested, which was not sufficient to retain jurisdiction as the plaintiffs expected. Appellants cannot complain after requesting the dismissal

that the trial court erred by entering the dismissal that they requested.

Motion for Reconsideration

A. Order on Appeal

Appellants represent in their brief that when they filed the motion for reconsideration, they also filed a motion to vacate the dismissal under section 473, subdivision (b), and attached an attorney affidavit of fault in which their attorney admitted to mistake. This is incorrect. They have never filed a motion to vacate the dismissal under section 473, subdivision (b). They filed a motion to vacate the dismissal under section 664.6 that did not mention section 473, subdivision (b), followed by a motion for reconsideration of the court's denial of their motion to vacate under section 664.6. In their motion for reconsideration, they cited case law relevant to reconsideration under section 1008, relief from dismissal under 473, subdivision (b), and enforcement of the settlement under 664.6, and they attached an attorney affidavit. There is no evidence in the record that the trial court construed their motion for reconsideration as a motion to vacate under section 473, subdivision (b). The minute order shows that the motion for reconsideration was denied.

The trial court may construe a pleading labeled as one type of motion to be a different type of motion. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193.)

Appellate courts, however, should not generally construe a motion that is expressly identified in the trial court to be an entirely different type of motion in the appellate court. (*APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 183 (*APRI*).) "'Even if we assume the trial court is free to ignore the label of a motion, it does not necessarily follow that appellate courts should do so as well, particularly when there is no indication that the motion was "construed" to be a different motion in the trial court. For an appellate court to construe a motion merely to "save" the appeal from dismissal may result in further problems and cannot be justified. [¶] As the court in *Ten Eyck v. Industrial Forklifts* [(1989)] 216 Cal.App.3d 540, noted, "counsel [is] duty-bound to know the rules of civil procedure." [Citation.] Ordinarily, on appeal, where a party has failed to invoke the proper procedure to preserve error for appellate review, has invited the error by his own conduct or is otherwise estopped to assert error, we will decline to rule on the merits of the issue. . . .'" ([*Passavanti v. Williams* (1990)] 225 Cal.App.3d [1602,] 1609, fn. omitted.)" (*APRI*, *supra*, 76 Cal.App.4th at p. 184.)

B. No New Facts Supported Motion for Reconsideration

Appellants contend the attorney affidavit of fault that they submitted with their motion for reconsideration supplied new or different facts satisfying the requirements

for reconsideration under Code of Civil Procedure section 1008. This is incorrect.

"Code of Civil Procedure section 1008 imposes special requirements on renewed applications for orders a court has previously refused. A party filing a renewed application must, among other things, submit an affidavit showing what 'new or different facts, circumstances, or law are claimed' (*id.*, subd. (b)) to justify the renewed application, and show diligence with a satisfactory explanation for not presenting the new or different information earlier (*California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 45–46, & fns. 14–15; see *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 688–690 [(*Garcia*)]). Section 1008 by its terms 'applies to all applications . . . for the renewal of a previous motion' and 'specifies the court's jurisdiction with regard to [such] applications.' (§ 1008, subd. (e).)" (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 833, fns. omitted (*Even Zohar*).)

An attorney's declaration in support of a motion for reconsideration that does not disclose new facts, but merely asserts counsel's mistake of law or imprecision in drafting the document at issue, is not a proper basis for reconsideration. (See *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670 [counsel's declaration that he believed an offer under section 998 included attorney fees and costs did not offer new facts supporting reconsideration under section 1008].) In this case, counsel's

affidavit in support of the motion for reconsideration states that by mistake, he did not submit a stipulation with an order requesting the court retain jurisdiction when the dismissal was filed. Counsel was aware of these facts, however, when appellants filed their motion to vacate. On October 31, 2018, the trial court denied appellants' application to enter judgment based on the settlement agreement for failing to submit a stipulation and an order to retain jurisdiction. It is clear from the record that when appellants filed their motion to vacate the dismissal, they were already aware of counsel's mistake. Appellants failed to meet the requirement to show diligence and a satisfactory explanation for failing to present the information in connection with the earlier motion.

C. Relief from Dismissal

Even if the motion for reconsideration had been construed as a motion to vacate under section 473, subdivision (b), it did not meet the requirements for mandatory or discretionary relief under that section.

"Section 473(b) contains two distinct provisions for relief from default. The first provision . . . is discretionary and broad in scope: 'The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.' (§ 473(b).) The second

provision is mandatory, at least for purposes of section 473, and narrowly covers only default judgments and defaults that will result in the entry of judgments. This provision . . . declares as follows: 'Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.' (§ 473(b).)" (*Even Zohar*, *supra*, 61 Cal.4th at pp. 838–839.)

1. No Mandatory Relief for Voluntary Dismissal

No relief was available under the mandatory relief provision of section 473, subdivision (b), from the appellants' voluntary dismissal. The mandatory relief provision applies to dismissals that are "'procedurally equivalent to a default.' (*Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1817 (*Peltier*), relying on *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1660–1661 and *Tustin Plaza Partnership v. Wehage* (1994) 27 Cal.App.4th 1557, 1565–1566; see *Generale Bank Nederland v. Eyes of the Beholder Ltd.*

[(1998)] 61 Cal.App.4th [1384,] 1397.)" (*Jackson v. Kaiser Foundation Hospitals, Inc.* (2019) 32 Cal.App.5th 166, 174–175 (*Jackson*).) "[D]ismissals that are sufficiently distinct from a default, thereby falling outside the scope of the mandatory provision, include '(1) a dismissal following the sustaining of a demurrer without leave to amend on the ground the statute of limitations had run [citation]; (2) a voluntary dismissal pursuant to a settlement agreement [citation]; and (3) a mandatory dismissal for failure to serve a complaint within three years [citation].' (*English* [*v. IKON Business Solutions, Inc.* (2001)] 94 Cal.App.4th [130,] 146.)" (*Jackson*, *supra*, 32 Cal.App.5th at p. 175.)

"In *Huens* [*v. Tatum* (1997)] 52 Cal.App.4th 259 [(*Huens*)], the plaintiff voluntarily dismissed her action after settling with the defendants and their liability insurers. (*Id.* at p. 261.) Shortly thereafter, she moved to vacate that dismissal under both the discretionary and mandatory relief provisions of section 473(b) on ground that her attorney miscalculated the amount of available liability coverage. (*Huens*, at p. 262.) *Huens* concluded the trial court properly denied discretionary relief because the attorney's mistake was not excusable. (*Id.* at p. 265.) In upholding the denial of mandatory relief for the voluntary dismissal, *Huens* noted 'the section's purpose was simply "to put plaintiffs whose cases are dismissed for failing to respond to a dismissal motion on the same footing with defendants who are defaulted for failing to respond to an action."' (*Id.* at p. 264.) Moreover, *Huens* observed, '[t]he purpose of the statute was

to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys. There is no evidence the amendment was intended to be a catch-all remedy for every case of poor judgment on the part of counsel which results in dismissal.' (*Ibid.*)" (*Jackson*, *supra*, 32 Cal.App.5th at pp. 175–176.)

The case law is clear that a voluntary dismissal pursuant to a settlement agreement is not procedurally equivalent to a default, in that the dismissal did not result from failing to oppose a motion, and therefore, mandatory relief under section 473, subdivision (b), is not available under the circumstances of this case.

2. No Discretionary Relief for Mistake of Law

No relief was available under the discretionary provision of section 473, subdivision (b), either. "'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' (*Generale Bank Nederland v. Eyes of the Beholder Ltd.*[, *supra*,] 61 Cal.App.4th [at p.] 1399.) In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent *person* under the same or similar circumstances" might have made the same error.'" (*Bettencourt v. Los Rios Community*

College Dist. (1986) 42 Cal.3d 270, 276, italics added.) In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' (*Garcia*, *supra*, 58 Cal.App.4th at p. 682.) 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' (*Ibid.*)" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258 (*Zamora*).)

In *Zamora*, the trial court concluded counsel's substitution of the word "against" instead of "in favor of" was a clerical or ministerial mistake that anyone could have made. (*Id.* at pp. 258–259.) "Indeed, appellate courts have routinely affirmed orders vacating judgments based on analogous mistakes made by an attorney or his or her staff. For example, courts have set aside judgments where: (1) The attorney mistakenly checked the 'with prejudice' box instead of the 'without prejudice' box (see *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1237 (*Romadka*)); (2) an associate misinterpreted the instructions of the lead attorney and gave incorrect information at a hearing (see *Bergloff v. Reynolds* (1960) 181 Cal.App.2d 349, 358–359); and (3) the attorney's secretary lost the answer to be filed (see *Alderman v. Jacobs* (1954) 128 Cal.App.2d 273, 275–276)." (*Zamora*, *supra*, 28 Cal.4th at p. 259.)

We review an order denying a motion to vacate under the discretionary provision of section 473, subdivision (b), for an abuse of discretion. We find no abuse of discretion in this case. Not only does the law require a stipulation by the parties, rather than the attorneys, in order to retain jurisdiction to enforce the settlement, but the trial court specifically advised counsel before the dismissal was filed that a stipulation was required by the parties in order to retain jurisdiction. The failure to submit a stipulation to the court, or request the court vacate the dismissal under section 473, subdivision (b), in the motion to vacate the dismissal were mistakes of law that are not excusable under the statute. No abuse of discretion has been shown in denying the motion for reconsideration.

DISPOSITION

The post-judgment order denying the motion for reconsideration of the motion to vacate the dismissal is affirmed. Because neither Gaurav Srivastava nor Veecon Biotech, LLC, filed a brief or otherwise made an appearance, no costs are awarded on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

MOOR, J.

We concur:

BAKER, Acting P. J.

KIM, J.